

1 BRAD D. BRIAN (CA Bar No. 079001, *pro hac vice*)
Brad.Brian@mto.com
2 LUIS LI (CA Bar No. 156081, *pro hac vice*)
Luis.Li@mto.com
3 TRUC T. DO (CA Bar No. 191845, *pro hac vice*)
Truc.Do@mto.com
4 MIRIAM L. SEIFTER (CA Bar No. 269589, *pro hac vice*)
Miriam.Seifter@mto.com
5 MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, Thirty-Fifth Floor
6 Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
7

8 THOMAS K. KELLY (AZ Bar No. 012025)
tskelly@kellydefense.com
425 E. Gurley
9 Prescott, Arizona 86301
Telephone: (928) 445-5484
10

11 Attorneys for Defendant JAMES ARTHUR RAY

12 SUPERIOR COURT OF STATE OF ARIZONA
13 COUNTY OF YAVAPAI

14 STATE OF ARIZONA,

15 Plaintiff,

16 vs.

17 JAMES ARTHUR RAY,

18 Defendant.
19

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S
REPLY IN SUPPORT OF MOTION TO
EXCLUDE DAVID KENT**

20 The testimony of purported expert witness David Kent must be excluded from this trial.
21 The State's unexcused disclosure violation, its extreme delay in presenting this issue to the Court,
22 and the threat to Mr. Ray's Due Process and fair-trial rights attendant to use of David Kent's
23 purported expert testimony at this late date all require this result. The State's Response to
24 Defendant's Motion to Preclude Testimony of David Kent, filed May 3, does not support the
25 admission of Kent's testimony. The Response (1) incorrectly claims that Dr. Kent was timely
26 disclosed; (2) incorrectly states that Rule 15.6 does not apply to the disclosure of witnesses; and
27 (3) incorrectly argues that preclusion is inappropriate on the facts of this case.
28

FILED
8:42 O'Clock P.M.

MAY - 4 2011

SANDRA K. MARKHAM, Clerk
By *Stephanie Kling*

1 **A. The State Has Violated Its Mandatory Disclosure Obligations Without Good**
2 **Cause, Due Diligence or Compliance with Rule 15.6.**

3 There is no dispute that the State did not disclose Kent as a trial witness until at least *five*
4 *months after* learning of his existence, and did not disclose Kent's statement until April 4, nearly
5 *two months into trial.*¹ To date, the State has *still* not filed a motion under Rule 15.6. That failing
6 defeats the State's attempt to use Dr. Kent's testimony, because a 15.6 motion, and discretionary
7 leave of court granted in response to the motion, are mandatory prerequisites to the admission of
8 Dr. Kent's testimony. *See* Ariz. R. Crim. P. 15.6(c), (d) ("A party seeking to use material and
9 information not disclosed at least seven days prior to trial *shall obtain leave of court by motion*,
10 supported by affidavit, to extend the time for disclosure and use the material or information."). In
11 any event, the State cannot assert the due diligence that the Rule requires. For these reasons, and
12 those set forth in the opening motion, preclusion is warranted.

13 **1. Rule 15.6 applies to the late disclosure of witnesses.**

14 The State's attempt to avoid the consequences of its disclosure violation rests on its
15 argument that its disclosure duties under Rule 15.6—which requires the completion of disclosure
16 *prior* to trial, and explicit leave of court to use material that is not timely disclosed—do not apply
17 to the late disclosure of witnesses. That is not the law.

18 According to the State, "Rule 15.6 applies to 'material or information,' not to noticing of a
19 trial witness." State's Response at 6. This argument misinterprets the phrase "material and
20 information." Rule 15.1, which sets forth the scope of the State's disclosure requirements,
21 explicitly includes the identification of witnesses in its list of "material and information" the State
22 must disclose. *See* Ariz. R. Crim. Proc. 15.1(a)(1) ("[T]he prosecutor shall make available to the
23 defendant the following ***material and information*** within the prosecutor's possession or control:

24 (1) The names and addresses of all persons whom the prosecutor intends to call as witnesses in

25 ¹ Because the State failed to file a motion under Rule 15.6, the State's attempt to introduce Kent's
26 testimony ripened on April 28, when the State revealed, during a pretrial discussion of legal matters, its
27 intent to call Dr. Kent as a witness. The Defense filed a motion to exclude Kent the same day, April 28.
28 On this record, Mr. Ray cannot agree with the State's suggestion that *the Defense* was dilatory in bringing
 the disclosure violation to the Court's attention, or that the Defense has any burden to do so. It is, of
 course, the *State's* burden to request leave to use the testimony of its late-disclosed witness. Ariz. R.
 Crim. P. 15.6(d).

1 the case-in-chief together with their relevant written or recorded statements[.]” (emphasis
2 added)). Rule 15.6(d) makes *that very disclosure duty* a continuing one. Ariz. R. Crim. Proc.
3 15.6(d) (“A party seeking to use **material and information** not disclosed at least seven days prior
4 to trial shall obtain leave of court by motion, supported by affidavit, to extend the time for
5 disclosure and use the material or information.” (emphasis added)).

6 Furthermore, Arizona courts have recognized that Rule 15.6 applies equally to the
7 disclosure of witnesses. *See, e.g., State v. Frederick*, 129 Ariz. 269, 272 (App. 1981) (“Rule
8 15.2(c) . . . provides that simultaneously with the notice of defenses submitted under Rule
9 15.2(b), the defendant is to make available to the prosecutor the names and addresses of
10 witnesses, other than the defendant, whom he intends to call at the time of trial. *Rule 15.6 makes*
11 *this a continuing obligation.*” (emphasis added)); *State v. Delgado*, 174 Ariz. 252, 259 (App.
12 1993) (“As soon as defense counsel became aware of the necessity of calling another expert
13 witness, she took immediate steps to find such witness and *promptly notified the state of the name*
14 *and address of the witness in accordance with Rule 15.6* and the court’s order.” (emphasis
15 added)). Any other rule would defy reason. The State cannot identify any basis for asserting that
16 the drafters of Arizona’s rules provided for *less* disclosure regarding expert witnesses—who need
17 to be investigated and interviewed—than of mere documents.

18 **2. The State Has Not Shown and Cannot Show Due Diligence or**
19 **Otherwise Justify Its Attempt to Use Late-Disclosed Evidence.**

20 The State’s effort to introduce Dr. Kent’s testimony would fail even if the State had filed a
21 motion under Rule 15.6, because the State cannot show the necessary “due diligence.” Ariz. R.
22 Crim. P. 15.6(d). The State has been aware of Dr. Kent since the beginning of its investigation.
23 *See* Defendant’s Motion at 2. Indeed, although at oral argument the County Attorney appeared to
24 advise the Court that the State learned of Dr. Kent only in March 2011,² the State’s Response
25 confirms that is incorrect. *See* Response at 2.

26 _____
27 ² THE COURT: I've said a number of times about the lack of evidence going to life-threatening
conditions. It wasn't just recently. *When did you first learn about Dr. Kent?*

28 MR. KELLY: Judge --

1 Given these facts, the State has not argued, and could not argue, that its failure to timely
2 disclose Dr. Kent is excused by due diligence or other good cause. The State's failure to comply
3 with its disclosure duty regarding Dr. Kent is particularly unjustifiable given the extensive
4 proceedings for the past six months regarding the presence or absence of heat illnesses in prior
5 years—the apparent subject of Kent's proposed testimony. That subject was covered fully at the
6 404(b) hearing in November 2010, and has been further addressed by this Court's consistent
7 findings and statements that there was no evidence of a life-threatening condition at sweat lodge
8 ceremonies in prior years.

9 **3. Introduction of Kent's Statements Would Prejudice Mr. Ray.**

10 For related reasons, the State's argument that the introduction of Kent's testimony would
11 not prejudice Mr. Ray is unrealistic. *See* State's Response at 6. All of the extensive litigation
12 regarding prior sweat lodge ceremonies has been based on a specific body of evidence known to
13 both parties and to the Court. Based on the timeline suggested by the Court, the State is likely on
14 the verge of resting its case. Yet the admission of Dr. Kent's testimony now would introduce an
15 entirely new set of alleged facts. That is especially concerning because Kent's statements do not
16 appear to be corroborated by the testimony of any other witness, and Mr. Ray would need to
17 conduct a separate investigation to test and rebut each of Kent's statements. It is "unrealistic and
18 unfair to expect a party to be able to respond to such dilatorily disclosed evidence." *Jones v.*
19 *Buchanan*, 177 Ariz. 410, 413 (App. 1993) (excluding an expert witness whose report was
20 disclosed two weeks prior to trial, in violation of Ariz. R. Civ. P. 26.1).

21
22
23 THE COURT: I want to know this date, Mr. Kelly. I want to hear what you have to say. But I want Ms.
24 Polk to tell me. She indicated disclosure on the 14th. But I am sorry. I didn't catch when you learned about
him.

25 MS. POLK: ***Right around that time.*** He called the detective. We were in trial. The detective called him
26 back. We immediately amended the witness list and then got the interview of Dr. Kent disclosed to the
defense. Dr. Kent told the detective that he had sent an email -- tried to send an email to the sheriff's office
back when the events happened in 2009. But that email was never received. ***We never knew about him.***

27 Partial Trial Transcript, 4/28/11, at 8:14–9:8 (attached as Exhibit A).

1 **B. Preclusion Is Warranted Here.**

2 The State says “there is . . . no legal precedent to preclude” Dr. Kent’s testimony.
3 Response at 8. That is incorrect. The United States Supreme Court has expressly held that
4 preclusion *is* an appropriate sanction for a serious discovery violation, especially when the party
5 has not established good cause for its violation. *See Taylor v. Illinois*, 484 U.S. 400, 415-16
6 (1988); *id.* at 413 (“It may well be true that alternative sanctions are adequate and appropriate in
7 most cases, but it is equally clear that they would be less effective than the preclusion sanction
8 and that there are instances in which they would perpetuate rather than limit the prejudice to the
9 [other party] and the harm to the adversary process.”). Consistent with this reasoning, Arizona
10 courts impose preclusion as a sanction when a party is “dilatory and negligent in not doing what
11 is clearly provided by the Rules of Discovery.” *State v. Killean*, 185 Ariz. 270, 271 (1996).

12 In *Killean*, for example, the Arizona Supreme Court held that the trial court was justified
13 “in precluding admission of corroborative documentary evidence as a sanction for defendant’s
14 violation of discovery rules by failing to reveal the existence of the evidence until trial.” 185
15 Ariz. at 270. The Supreme Court explained that the trial court had found that counsel had been
16 “dilatory and negligent in not doing what is clearly provided by the Rules of Discovery,” and that
17 such “unexplained failure to do what the rules require” sufficient to support preclusion. *Id.* at
18 271. Applying the factors set forth in *State v. Smith*, 140 Ariz. 355 (1984), the Arizona Supreme
19 Court concluded that the sanction of preclusion was “precisely proportionate to the harm caused
20 by the discovery violation,” and was the only sanction—other than a mistrial—adequate to
21 remedy the violation. *Id.* Similarly, in *State v. Thompson*, 190 Ariz. 555, 558 (App. 1997), the
22 court of appeal affirmed the trial court’s exclusion of a defense witness who was not disclosed
23 until the first day of trial—a disclosure that the trial court deemed “extraordinarily late.” The
24 court found it relevant both that the state was surprised by the divulgence of this witness and that
25 “his tardy disclosure was attributable solely to the defendant, who offered no excuse.” *Id.* *See*
26 *also State v. Williams*, 113 Ariz. 442, 444 (1976) (trial court did not abuse its discretion in
27 excluding proposed alibi witness who was not disclosed until the day trial began). There is thus
28 ample precedent for the preclusion of Dr. Kent. And preclusion is strongly supported by the

1 extent of the State's disclosure violation, its failure to seek required leave of court under Rule
2 15.6, and the threat to Mr. Ray's Due Process and fair-trial rights that would attend the use of the
3 late-disclosed evidence.

4 DATED: May 4, 2011

MUNGER, TOLLES & OLSON LLP
BRAD D. BRIAN
LUIS LI
TRUC T. DO
MIRIAM L. SEIFTER

7 THOMAS K. KELLY

8 By: 
9

10 Attorneys for Defendant James Arthur Ray

11 Copy of the foregoing delivered this 4th day
12 of May, 2011, to:

13 Sheila Polk
14 Yavapai County Attorney
15 Prescott, Arizona 86301

16 by 
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.) Case No. V1300CR201080049
)
JAMES ARTHUR RAY,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY THIRTY-EIGHT

APRIL 28, 2011

Camp Verde, Arizona

(Partial transcript -- excerpted portions.)

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

1 APPEARANCES OF COUNSEL:

2 For the Plaintiff:

3 YAVAPAI COUNTY ATTORNEY'S OFFICE
4 BY: SHEILA SULLIVAN POLK, ATTORNEY
5 BY: BILL R. HUGHES, ATTORNEY
255 East Gurley
6 Prescott, Arizona 86301-3868

7 For the Defendant:

8 THOMAS K. KELLY, PC
9 BY: THOMAS K. KELLY, ATTORNEY
425 East Gurley
Prescott, Arizona 86301-0001

10 MUNGER TOLLES & OLSON, LLP
11 BY: LUIS LI, ATTORNEY
12 BY: TRUC DO, ATTORNEY
355 South Grand Avenue
Thirti-fifth Floor
Los Angeles, California 90071-1560

13 MUNGER TOLLES & OLSON, LLP
14 BY: MIRIAM L. SEIFTER, ATTORNEY
15 560 Mission Street
San Francisco, California 94105-2907

1 Proceedings had before the Honorable
2 WARREN R. DARROW, Judge, taken on Thursday,
3 April 28, 2011, at Yavapai County Superior Court,
4 Division Pro Tem B, 2840 North Commonwealth Drive,
5 Camp Verde, Arizona, before Mina G. Hunt, Certified
6 Reporter within and for the State of Arizona.

P R O C E E D I N G S

(Partial transcript -- excerpted portions.)

(First excerpt:)

MS. POLK: No. That's not the issue I was addressing at all. And I can take it up after lunch if the Court wants.

What the jury has heard so far is just based on what the Mercers were telling him. That began to form the direction that his investigation would take. We are going to get when we go through with the jury everything Detective Diskin did.

Then as he learns more and more, particularly finds out more and more about what happens in the prior years, then he begins -- focuses more and more on Mr. Ray's conduct.

And relevant to that discussion, then, there will be some questions asked toward the end of his testimony. Part and parcel of that, Your Honor, will be -- we can argue this later. But the Court had ruled precluding further testimony about what happened in prior years.

And I'd like to request that the Court allow the state to bring in Dr. Kent, who is a witness from 2008, particularly in light of what

09:48:54AM 1 the Court said yesterday. You mentioned there had
09:48:56AM 2 been no testimony that any of the events in prior
09:48:59AM 3 years were life-threatening.

09:49:00AM 4 I'll just make an offer of proof that
09:49:03AM 5 Dr. Kent would testify that he was inside the sweat
09:49:07AM 6 lodge in 2008, that he recognized what was going on
09:49:10AM 7 around him were the signs and symptoms of
09:49:13AM 8 heat-related illnesses that would result in heat
09:49:17AM 9 stroke, that he left the sweat lodge early in 2008.

09:49:20AM 10 He describes what he saw outside, how he
09:49:23AM 11 assisted participants outside for what he will
09:49:28AM 12 describe as heat-related illnesses. He is a doctor
09:49:30AM 13 from Canada who is an anesthesiologist.

09:49:33AM 14 He then tells the staff for Mr. Ray, as
09:49:36AM 15 well as Dream Team members on the outside, that
09:49:38AM 16 what was going on was life-threatening, that it was
09:49:41AM 17 very dangerous, that this is how people die.

09:49:43AM 18 And then in the end of the ceremony, it's
09:49:46AM 19 Dr. Kent who looked back inside and he saw two
09:49:49AM 20 people still inside unconscious. He brought them
09:49:52AM 21 out. He treated them. And he believes that he
09:49:54AM 22 saved their lives.

09:49:55AM 23 This is not information that was known to
09:49:57AM 24 the state back when we did prior hearings. This is
09:50:00AM 25 an individual who came forward after the trial had

09:50:03AM 1 begun. We interviewed him. We immediately
09:50:07AM 2 disclosed him and the audio of his interview on
09:50:10AM 3 March 14th. And we added him to our witness list
09:50:13AM 4 on March 14th.

09:50:14AM 5 We had intended to call him as a witness
09:50:17AM 6 when we began talking about the prior events and we
09:50:21AM 7 had started with the Mercers. And after hearing
09:50:23AM 8 from the Mercers and then a motion by the defense,
09:50:26AM 9 the Court had ruled no more testimony will come in.

09:50:30AM 10 Particularly in light of the Court's
09:50:32AM 11 statement yesterday that you had heard no
09:50:33AM 12 information from prior years that this conduct was
09:50:36AM 13 life-threatening, this is clearly relevant
09:50:39AM 14 testimony on that point. And with respect to 2008,
09:50:43AM 15 Dr. Kent will testify that six people should have
09:50:45AM 16 gone to the hospital.

09:50:46AM 17 THE COURT: I talked about and ruled that --
09:50:52AM 18 there was a question whether the testimony already
09:50:55AM 19 admitted at this point would stay in the trial
09:50:58AM 20 absent additional expert testimony. I also talked
09:51:03AM 21 about just having cumulative testimony when the
09:51:07AM 22 witnesses so far have laid out in such detail the
09:51:11AM 23 various things they have observed.

09:51:13AM 24 But once again, this witness -- and the
09:51:18AM 25 first thing came to my mind, where was this witness

09:51:20AM 1 at the 404(b) stage of this? Because I've always
09:51:25AM 2 said the evidence I have seen, there was only the
09:51:28AM 3 Daniel P. evidence that had any type of actual
09:51:32AM 4 medical care involved, medical involvement. And
09:51:38AM 5 there just was nothing else.

09:51:43AM 6 But this Dr. Kent was disclosed two weeks
09:51:49AM 7 after opening statement. Apparently was watching
09:51:53AM 8 the proceedings or something?

09:51:56AM 9 MS. POLK: I don't know if he was watching,
09:51:59AM 10 Your Honor, or read about it in the paper. But
09:52:01AM 11 this is obviously somebody the state didn't know
09:52:03AM 12 about at the time of the prior hearing.

09:52:05AM 13 When he contacted Detective Diskin,
09:52:07AM 14 Detective Diskin returned the call, did the
09:52:09AM 15 interview. We immediately disclosed it to the
09:52:12AM 16 defense and the audio. The defense has had this
09:52:15AM 17 since March 14, which would be more than -- that's
09:52:20AM 18 a month and a half. And they've known about it.

09:52:24AM 19 And the state intended to call him. We
09:52:26AM 20 had intended from the time we included him on the
09:52:29AM 21 witness list to call him, along with many other
09:52:33AM 22 witnesses pertaining to the prior years.

09:52:35AM 23 And then last week the Court issued your
09:52:38AM 24 ruling precluding further testimony -- allowing the
09:52:41AM 25 testimony to stand but precluding further

09:52:43AM 1 testimony. And at that point we understood we
09:52:46AM 2 couldn't bring in Dr. Kent or others.

09:52:49AM 3 But when the Court made the reference
09:52:50AM 4 yesterday to never having heard testimony that what
09:52:54AM 5 was going on was life-threatening, it's obvious
09:52:57AM 6 this information is not cumulative because it is
09:53:02AM 7 different from the Mercers. This is a doctor, an
09:53:05AM 8 anesthesiologist, who clearly recognizes various
09:53:10AM 9 stages of unconsciousness, who was there in 2008,
09:53:13AM 10 who has been fully disclosed to the defense, and
09:53:17AM 11 who would be relevant in this trial. And, again,
09:53:20AM 12 this all goes back to the issue of causation, which
09:53:23AM 13 the defense has made an issue in the case.

09:53:26AM 14 THE COURT: I've said a number of times about
09:53:29AM 15 the lack of evidence going to life-threatening
09:53:33AM 16 conditions. It wasn't just recently.

09:53:37AM 17 When did you first learn about Dr. Kent?

09:53:37AM 18 MR. KELLY: Judge --

09:53:43AM 19 THE COURT: I want to know this date,
09:53:44AM 20 Mr. Kelly. I want to hear what you have to say.
09:53:47AM 21 But I want Ms. Polk to tell me. She indicated
09:53:49AM 22 disclosure on the 14th.

09:53:50AM 23 But I am sorry. I didn't catch when you
09:53:52AM 24 learned about him.

09:53:55AM 25 MS. POLK: Right around that time. He called

09:53:57AM 1 the detective. We were in trial. The detective
09:53:59AM 2 called him back. We immediately amended the
09:54:03AM 3 witness list and then got the interview of Dr. Kent
09:54:08AM 4 disclosed to the defense. Dr. Kent told the
09:54:11AM 5 detective that he had sent an email -- tried to
09:54:14AM 6 send an email to the sheriff's office back when the
09:54:17AM 7 events happened in 2009. But that email was never
09:54:22AM 8 received. We never knew about him.

09:54:24AM 9 And then on the 14th he called, or
09:54:27AM 10 sometime shortly before then, contacted the
09:54:31AM 11 sheriff's office. And then Detective Diskin called
09:54:32AM 12 him back. We immediately disclosed it. It's been
09:54:35AM 13 more than six weeks now. It's been, I guess, seven
09:54:39AM 14 weeks that the defense has now known about
09:54:41AM 15 Dr. Kent.

09:54:42AM 16 And, Your Honor, we intended to call him.
09:54:45AM 17 We intended to call many witnesses about 2008,
09:54:48AM 18 2007, because people have different perspectives.
09:54:52AM 19 But obviously this doctor has a unique perspective
09:54:55AM 20 because he's a doctor and specifically will testify
09:54:58AM 21 that what he saw was life-threatening, what he saw
09:55:02AM 22 was dangerous, that he believes he saved two lives,
09:55:05AM 23 that he assisted six others, and that he told the
09:55:09AM 24 Dream Team members and staff while the event was
09:55:11AM 25 going on in 2008 that this was life-threatening and

09:55:15AM 1 dangerous and that people could die.

09:55:20AM 2 THE COURT: Mr. Kelly.

09:55:22AM 3 MR. KELLY: Judge, Dr. Kent was on the roster
09:55:25AM 4 of participants, which the government has had in
09:55:27AM 5 its possession since 2009. This is not a surprise
09:55:30AM 6 witness. They knew he existed. Detective Diskin
09:55:34AM 7 knew he existed as one of the participants in '09.

09:55:38AM 8 Ms. Do -- and then apparently what
09:55:51AM 9 happens, as I understand, is this gentleman is
09:55:54AM 10 watching In Session TV and then decides after the
09:55:58AM 11 beginning of trial to provide an opinion in regards
09:56:00AM 12 to what he observed in 2008. I think that's what
09:56:02AM 13 the government is saying.

09:56:03AM 14 So now they're saying, lo and behold,
09:56:06AM 15 after listening to Mr. Li's opening, we need this
09:56:09AM 16 guy in listening to your rulings.

09:56:12AM 17 So in the middle of this trial, without a
09:56:15AM 18 Terrazas hearing, which they had the opportunity
09:56:18AM 19 in 2010 to conduct, and given due diligence by the
09:56:18AM 20 State of Arizona, they could have interviewed this
09:56:22AM 21 fellow. If that were his opinion before he watched
09:56:24AM 22 the TV coverage, they could have presented him
09:56:27AM 23 during that lengthy one-week hearing.

09:56:29AM 24 And now they want to jump over the legal
09:56:32AM 25 requirements under Arizona law that this court hear

09:56:35AM 1 all testimony from this purported doctor we have no
09:56:39AM 2 background information on, who, if he did
09:56:42AM 3 participate in 2008, if he is a medical doctor --
09:56:46AM 4 keep in mind, he didn't call EMS. He didn't render
09:56:49AM 5 any type of aid. That lends highly doubtful
09:56:54AM 6 credibility to his opinion that now, some three
09:56:58AM 7 years later, he decides that he wants to become a
09:57:00AM 8 witness in this case.

09:57:01AM 9 The bottom line, Judge, is we have
09:57:03AM 10 disclosure violations. He appears with this
09:57:07AM 11 purported opinion after Mr. Li's opening statement
09:57:11AM 12 where we outlined our defense, presents significant
09:57:16AM 13 due-process considerations for Mr. Ray in receiving
09:57:18AM 14 a fair trial.

09:57:20AM 15 And before this court could ever even
09:57:22AM 16 begin to consider whether his admissibility --
09:57:26AM 17 excuse me -- his testimony is admissible, there has
09:57:28AM 18 to be a Terrazas hearing. And that Terrazas
09:57:31AM 19 hearing, Judge, is not limited to Dr. Kent.

09:57:34AM 20 If it is his opinion that six or eight
09:57:37AM 21 people somehow suffered some type of medical
09:57:39AM 22 distress in 2008, then we need to hear from those
09:57:44AM 23 six or eight people. In addition to those six or
09:57:47AM 24 eight people, we need to hear from the other
09:57:48AM 25 participants in 2008 before you could make a

09:57:53AM 1 well-reasoned decision as to admissibility under
09:57:57AM 2 Terrazas alone.

09:57:58AM 3 Judge, if somehow now the government is
09:58:01AM 4 saying over halfway through this trial that they're
09:58:04AM 5 going to present the testimony of an undisclosed
09:58:07AM 6 witness who apparently is going to provide an
09:58:11AM 7 opinion which makes him an expert, they have not
09:58:14AM 8 complied with 15.6. They've not complied with any
09:58:17AM 9 aspect of Rule 15. And they've known of his
09:58:21AM 10 existence since 2009. That's what we're confronted
09:58:25AM 11 with.

09:58:25AM 12 And I would submit, Judge, if that's the
09:58:27AM 13 case, if there is any credible or honest
09:58:32AM 14 consideration of this request today, then this
09:58:36AM 15 trial has to be continued until these legal matters
09:58:39AM 16 are resolved. And this jury -- we don't want that.
09:58:43AM 17 We want a jury verdict. And we want this jury to
09:58:46AM 18 decide that verdict. And we don't want to start
09:58:49AM 19 again. And this is just out of hand.

09:58:51AM 20 THE COURT: Pardon my gesturing here. But
09:58:54AM 21 we're going to start the trial again here in a
09:58:57AM 22 moment.

09:59:00AM 23 I'll say this: There certainly are very
09:59:03AM 24 large disclosure concerns. But I don't know that
09:59:07AM 25 this is a 404(b) Terrazas kind of issue with this

09:59:11AM 1 kind of testimony. Mr. Kelly, I'm not convinced
09:59:16AM 2 that it is. I raise that. It certainly would seem
09:59:19AM 3 that would have been the time in that context that
09:59:23AM 4 it would have been discussed. But --

09:59:29AM 5 MS. POLK: Your Honor, may I respond to the
09:59:30AM 6 disclosure issue?

09:59:30AM 7 (End of first excerpt.)

09:59:30AM 8 (Second excerpt:)

04:10:08PM 9 THE COURT: I've never had a trial, I don't
04:10:10PM 10 think, where without an agreement of the parties as
04:10:14PM 11 to the statement, the nature of the statement, a
04:10:16PM 12 statement has come in that I haven't reviewed. I'm
04:10:21PM 13 not aware of that.

04:10:25PM 14 I understand how encompassing my
04:10:27PM 15 801(d)(2)(b) -- and, of course, if it's a statement
04:10:32PM 16 of a party opponent, it's not hearsay at all. It's
04:10:35PM 17 not an exception. It's just not hearsay. But I've
04:10:39PM 18 never had something, anything remotely like this
04:10:43PM 19 where statements days ahead of time, continuous
04:10:48PM 20 statements.

04:10:52PM 21 MS. POLK: Your Honor, with respect to
04:10:53PM 22 confessions, obviously the Court hears about those.
04:10:57PM 23 And there are court hearings and a determination by
04:11:00PM 24 the Court that statements of a defendant are
04:11:03PM 25 admissible.

04:11:04PM 1 Outside of the context of confessions,
04:11:07PM 2 defendant's statements are admissible. They are
04:11:09PM 3 not hearsay, and they frequently will come into a
04:11:12PM 4 trial.

04:11:15PM 5 Your Honor, I wanted to respond to this
04:11:17PM 6 issue of duty and a failure to act and the
04:11:20PM 7 suggestion that the state has not provided the
04:11:22PM 8 Court with authority or responded to that argument.

04:11:25PM 9 I think both counsel and the Court know
04:11:26PM 10 that the law -- and the state's position is that
04:11:30PM 11 the law is, with respect to conduct, the state does
04:11:35PM 12 not have to show a duty to act when the crime is
04:11:38PM 13 the conduct. If the theory for the crime is a
04:11:40PM 14 failure to act --

04:11:41PM 15 THE COURT: Omission.

04:11:43PM 16 MS. POLK: An omission. Then there is a duty
04:11:45PM 17 to show a legal or statutory duty. And that's that
04:11:50PM 18 distinction that Mr. Li was just blurring there.
04:11:52PM 19 And we provided the Court with authority on that
04:11:56PM 20 position.

04:11:56PM 21 MR. LI: Blurring?

04:12:02PM 22 Your Honor, I think actually we filed a
04:12:04PM 23 motion that laid out what the constitutional
04:12:06PM 24 requirements are. I believe -- and I don't want to
04:12:09PM 25 get blurring. I don't want to react too much to

04:12:13PM 1 that.

04:12:13PM 2 I believe Mr. Hughes actually got up
04:12:15PM 3 there and told this court that in the context of an
04:12:19PM 4 admission -- omission that the state did not have
04:12:21PM 5 to prove a duty. And --

04:12:24PM 6 THE COURT: No.

04:12:26PM 7 MR. LI: I think the Court -- I recall the
04:12:29PM 8 Court asking, are you telling me that you don't
04:12:31PM 9 have to show a duty?

04:12:32PM 10 And Mr. Hughes said, yes.

04:12:34PM 11 But be that as it may.

04:12:36PM 12 THE COURT: I think Ms. Polk is just now said
04:12:40PM 13 with the case of omissions there has to be a duty
04:12:44PM 14 shown. But, again, I do recall Mr. Hughes
04:12:48PM 15 indicating that that could be found within the
04:12:51PM 16 criminal statute.

04:12:52PM 17 MR. LI: Yes.

04:12:53PM 18 THE COURT: And the law is clear that it
04:12:55PM 19 cannot.

04:12:58PM 20 And, Ms. Polk, you're correct. I mean,
04:13:00PM 21 most of the time when I'm looking at statements, it
04:13:04PM 22 has to do with voluntariness and those issues. I
04:13:08PM 23 don't know of any item of evidence that's contested
04:13:10PM 24 like this where I don't actually know what's there
04:13:13PM 25 before I rule on it.

04:13:17PM 1 And if there are First Amendment issues
04:13:19PM 2 that are implicated because it just can't -- I
04:13:23PM 3 don't know. I mean, who's the audience? With the
04:13:27PM 4 sweat lodge it was pretty clear who the relevant
04:13:31PM 5 audience would be. But with these other things,
04:13:33PM 6 what are they.

04:13:34PM 7 So yes. You're right. Normally it has
04:13:38PM 8 to do with confession or a statement of some sort
04:13:41PM 9 and whether it's voluntary. But this is a
04:13:44PM 10 contested item of evidence that I don't even know
04:13:47PM 11 what's on it. How do I rule on that?

04:13:51PM 12 MR. KELLY: Judge, I just have much more
04:13:53PM 13 simple approach. And it's along the lines of what
04:13:56PM 14 you're talking about. We have now raised issues
04:13:59PM 15 relating to 610, religious beliefs, relevancy, 403,
04:14:05PM 16 prejudice, how this information runs afoul of some
04:14:08PM 17 prior Court orders regarding finances of JRI and
04:14:14PM 18 James Ray, as well as the First Amendment, as
04:14:16PM 19 articulated by Mr. Li. Many issues.

04:14:19PM 20 And the only way -- and I'm not waiving
04:14:25PM 21 any argument as simply not admissible. But before
04:14:29PM 22 a decision could be made -- and the final one is
04:14:31PM 23 hearsay. Because we have people who are not
04:14:33PM 24 Mr. Ray speaking. The Court would have to listen
04:14:37PM 25 to this tape. And I've tried. I've listened for

04:14:40PM 1 more hours than I care to count.

04:14:42PM 2 And then from a very practical
04:14:43PM 3 standpoint, if it's admitted, then the jury is
04:14:46PM 4 going to have to listen to it. You don't admit
04:14:49PM 5 evidence anticipating the jury is not going to
04:14:52PM 6 consider it.

04:14:52PM 7 So for all the reasons that have been
04:14:55PM 8 articulated during the past month and a half about
04:14:58PM 9 this recording -- if I recall, the very first
04:15:01PM 10 witness I cross-examined, we discussed this issue.
04:15:05PM 11 And now it's resurfacing. I thought it was over.

04:15:10PM 12 Anyway, that was just a more simplistic,
04:15:14PM 13 practical approach is you would have to listen to
04:15:17PM 14 it before it can be admitted, if you are going to
04:15:19PM 15 admit even a portion of it.

04:15:21PM 16 We did stipulate to the preswearing lodge
04:15:24PM 17 presentation, avoiding the necessity of you
04:15:28PM 18 reviewing those statements. Other than that we're
04:15:30PM 19 not agreeing.

20 (End of second excerpt.)

21 (End of partial transcript.)

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1 STATE OF ARIZONA)
2 COUNTY OF YAVAPAI) ss: REPORTER'S CERTIFICATE

3
4 I, Mina G. Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California.

7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing
11 constitutes a true and correct transcript.

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action.

16 In witness whereof, I have affixed my
17 signature this 3rd day of May, 2011.

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